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DISCUSSION RESPONSE

Understanding the impact of different concepts of surrogate mother for the regulation of international surrogacy arrangements

A response to Sharon Bassan

MICHELLE COTTIER — 22 July, 2016

In her post to this blog, Sharon Bassan advances the argument for a duty on consumers' states to regulate cross-border surrogacy transactions. The factual background is as follows: intended parents residing in a country with a higher average income, travel to a country with a lower average income, usually in eastern Europe or the global south, to

make use of the services of a surrogate mother, and then return to their state of residence with the child. Sharon Bassan argues that while the consumers' states are free to ban surrogacy on their own territory, they are not free to regulate cross-border surrogacy transactions and "have at least an ethical if not even a legal duty to cooperate internationally in order to have cross-border markets regulated and monitored". She finds support for such a duty in the recent case law of the European Court of Human Rights in *Mennesson v. France*, *Labassee v. France*, and *Paradiso and Campanelli v. Italy*.

I follow the argument for a duty (at least of an ethical nature) on states whose residents make use of reproductive services abroad to participate in international endeavours to protect the rights of all parties involved. However, I will argue in my response that we need to engage critically with the discourses on motherhood and parentage that underlie different current national approaches to the regulation of surrogacy. The international efforts risk failing to address the needs of the weaker parties involved, i.e. the rights of the surrogate and the child, if the problematic implications of certain concepts are not questioned.

Three ideal types of surrogate mother underlying different regulatory choices

I have argued elsewhere (Michelle Cottier, "Die instrumentalisierte Frau: Rechtliche Konstruktionen der Leihmutterschaft", juridikum 2/2016, pp. 188-198) that the dissimilarities in the legal regulation of surrogacy worldwide can be better understood by distinguishing three ideal types (in the Weberian sense) of the legal notion of surrogate mother.

The instrumentalised woman

The first regulatory ideal type relies on the image of the "instrumentalised woman". In this model, the surrogate mother is seen as being instrumentalised by the intended parents, and used as a sort of incubator. An ethically acceptable form of surrogacy is regarded *per se* as inconceivable. This view relies in cultural terms on an essentialising and naturalising understanding of parentage, in which motherhood is created by pre-natal bonding between the mother and the child. The typical regulatory choice made on the basis of this notion is a complete ban on the practice within the territory concerned (e.g. Switzerland, Germany, Austria, France, Italy, Norway, Portugal and some US states).

As Sharon Bassan also observes, countries with a ban on surrogacy have particular difficulties in coping with the reality of their residents using the services of a surrogate elsewhere. The recognition of legal parentage established in a country with a more liberal legal regime appears inconsistent with the assumption of the unethicality of the practice and public policy arguments are brought forward against it.

The European Court of Human Rights in the cases brought against France and Italy cited above has found a way to reconcile an essentialist and naturalist vision of parentage with the need to protect the rights of the child living with the intended parents. The Strasbourg Court has held that the children's right to respect for their *private* life based on article 8 ECHR (but not the intended parents' and their children's right to *family* life) requires a recognition of the children's link to their genetic parent (in this case the

intended father) in terms of legal parentage (*Mennesson* §§ 87 – 102; *Labassee* §§ 66 – 81). What at first sight seems to be a departure from a restrictive approach, typical for the instrumentalisation argument, is on closer reading consistent with the deeper concern behind it, i.e. maintenance of the idea of a "natural" basis of parentage. The "natural" bond of motherhood is replaced by the genetic tie to at least one intended parent, thereby re-establishing the "natural order of things". In an era when parentage is more and more detached from genetics, due to the pluralisation of socially accepted family forms, this privileging of biology over social and emotional bonds between parent and child is not convincing. This inadequacy can be seen in a recent judgment of the Swiss Federal Court in which the parentage of two intended parents was not recognised, as neither of them was genetically linked to the child born by a surrogate mother after in vitro fertilisation of the gametes of two donors (BGE 141 III 328).

The altruistic helper

The second ideal type we can observe in comparing different regulatory approaches to surrogacy is that of the "altruistic helper". From this perspective, the surrogate mother, following an altruistic motivation, helps a childless couple or single person to fulfil their dream of becoming a parent. Commercial arrangements, where compensation for the services of the surrogate is negotiated in an increasingly globalised reproductive market, are therefore deemed unacceptable. The altruistic notion underlies the regulation of surrogacy in the United Kingdom, Greece, Israel, South Africa, India (only very recently), New Zealand, most Australian and Canadian states, territories or provinces, as well as in some US states. While this model more easily

allows for the recognition of parentage established in other jurisdictions, at least if the surrogacy arrangement did not include an unacceptably high fee (compare the example given in HCCH Parentage/Surrogacy Project Background Note January 2016 – Annex 1, p. x), and also is more prone to a non-essentialist concept of parentage, the problem with altruism is the unequal distribution of the costs and benefits of the surrogacy arrangement and the lack of recognition for reproductive labour. As anthropologist Amrita Pande has noted in the context of the recent switch in India to the altruistic model: "In essence altruistic surrogacy forces women to provide services for free, under the guise of a moral celebration of their altruism". It would therefore be problematic if this model was imposed on surrogates' states under international law, as it risks further weakening the already structurally inferior position of the women involved.

The provider of reproductive services

The third ideal type is that of the surrogate mother as "provider of reproductive services". This model conceives of the surrogacy arrangement as a contract, all important elements of which are negotiated between the intended parents and the surrogate. This model underlies the regulation in certain US states, such as California, following the 1993 decision of the California Supreme Court in *Johnson v. Calvert* (5 Cal 4th 84, 19 Cal Rptr 2d 494, 851 P 2d 776).

The contractual model has the advantage of opening up a space for the articulation of interests and possible conflicts (for example concerning medical decision-making in the case of a diagnosed handicap of the unborn child) which are not openly negotiable in the altruistic model. Furthermore, as Amrita Pande as well as feminist legal scholar Prabha

Kotiswaran emphasise, if surrogate mothers conceive of themselves as workers, they more easily see the possibility for collective organisation in defence of their rights. Like the altruistic model, it relies on a non-essentialist concept of parentage which is based on intention, and which is consistent with family relations in a pluralised context.

On the whole, the contractual model is the most suitable of the three concepts for attaining the goal of protecting the weaker parties' interests. It, however, also comes with certain risks, which the international community should strive to contain when establishing a regulation of transnational surrogacy arrangements. Frameworks need to be created that counterbalance unequal bargaining positions between the surrogate mother and the intended parents due to unequal distribution of material resources and knowledge. Additionally, they must ensure the close monitoring of medical practice and set certain limits on the freedom of contract in order to protect the surrogates' rights to self-determination. Finally, contact agreements between surrogate mothers, the intended parents and the child for the period after the birth should be encouraged, thus ensuring respect for both the child's right to know her origins and the human dignity of the surrogate mother (cf. Bleisch).

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